

**March 30, 2009**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Power Wire Constructors

Date of Filing: March 9, 2009

Case Number: TFA-0297

On March 9, 2009, Power Wire Constructors (Power Wire) filed an Appeal from a determination issued to it by the Department of Energy's Western Area Power Administration (WAPA). In that determination, WAPA withheld information in response to a request for information that Power Wire filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require WAPA to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

**I. Background**

On November 21, 2008, Power Wire submitted an electronic FOIA request to WAPA's Upper Great Plains Regional Office (UGPR), for "[WAPA's] employees' and inspectors' daily reports, logs, notes, letters, e-mails, etc., ... [including the] writings of Ron French, Sid Paulson, Jimmy Black, Cory Herman, David Kluth, Pat Doak, Don McCleary and Jim Dickey" beginning August 1, 2008, to the present. (FOIA Request). On November 21, 2008, UGPR forwarded the request to the FOIA Office at DOE Headquarters (DOE/FOI). Upon receipt, DOE/FOI assigned the request to the Office of General Counsel at WAPA, the office most likely to have responsive documents. On December 2, 2008, Power Wire amended its FOIA request to include a search for additional documents.

WAPA conducted a search of its records and located over 2,000 pages of responsive documents. In its initial response, WAPA provided Power Wire with 140 pages of the responsive material. Letter from WAPA to Power Wire, January 13, 2009 (Initial Determination Letter).<sup>1</sup> In its second

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<sup>1</sup> In its initial response dated January 13, 2009, and supplemental response dated February 10, 2009, WAPA provided Power Wire with responsive documents in their entirety. The initial determination and supplemental response are not the subject of this appeal.

response, WAPA produced 2,284 pages of responsive material but withheld portions of the documents claiming that those portions were shielded under the deliberative process and attorney-client privileges of Exemption 5. Letter from WAPA to Power Wire, January 26, 2009 (Final Determination Letter). WAPA also withheld employees' personal e-mail addresses and telephone numbers pursuant to Exemption 6. *Id.*

On March 9, 2009, Power Wire filed this Appeal of WAPA's decision to withhold information under Exemptions 5 and 6, arguing that there is no basis for withholding the information. Appeal Letter at 1. Later in its Appeal, Power Wire requests the redaction of the personal privacy information so that all of the responsive material can be immediately provided to them. *Id.* That request is inconsistent with Power Wire's challenge of WAPA's application of Exemption 6 to employees' personal information. Nevertheless, I analyze below WAPA's application of both Exemption 5 and Exemption 6 to the information it withheld from the material responsive to Power Wire's November 21, 2008, request for information.

## II. Analysis

### A. WAPA's Justification of Exemption 5

After conducting a search for records under the FOIA, an agency must provide a written determination notifying the requester of the results of that search and, if applicable, a "statement of the reason for denial, containing a reference to the specific exemption under the [FOIA] authorizing the withholding of the record, ... a brief explanation of how the exemption applies to the record withheld, and a statement of why discretionary release is not appropriate." 10 C.F.R. § 1004.7(b). Thus, an agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *State of New York*, Case No. TFA-0269 (2008); *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996) (*RIS*).<sup>2</sup> Generally, a determination is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* This allows both the requester and this Office to determine whether the claimed exception was accurately applied. *Tri-State Drilling, Inc.*, Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and assists this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, Case No. LFA-0176 (1992). Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations.

In its Final Determination Letter, WAPA provided a categorical explanation that information pertaining to the Letcher Substation Historical Site Incident Investigation was withheld pursuant to

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<sup>2</sup> Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

the deliberative process privilege of Exemption 5, because the draft documents created during the investigation, as well as comments, notes and preliminary opinions reflected in the documents, consists of pre-decisional, deliberative material that does not represent the final position of the agency. *Id.* WAPA further stated that it withheld documents that contained confidential communications because they revealed the motive of its client in seeking the legal advice of WAPA's General Counsel personnel. Although WAPA provided an explanation for invoking the deliberative process and attorney-client privileges under Exemption 5, our review of the Determination Letter indicates that in documents where portions of information were withheld, WAPA failed to identify which portions were withheld pursuant to the deliberative process privilege and which were withheld pursuant to the attorney-client privilege. Our Office cannot conduct a meaningful review of the documents without an adequate description of which privilege applies to the information that was withheld. Thus, an administrative appeal without additional information is virtually impossible with regard to all Exemption 5 withholdings.

In cases where agencies do not provide adequate justification for withholding information under an enumerated FOIA exemption, we have remanded the request to the agency with instruction to issue a new determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). Accordingly, we will remand this matter to WAPA to articulate which privileges apply to the specific parts of the documents. The basis for each withholding under Exemption 5 must be explained in a new determination letter, with specific reference to the privileges invoked in each case. In a situation where several portions of a document are withheld for the same reason, WAPA may identify each portion withheld and then provide categorical explanation for the exemption's application to all such portions. WAPA must nevertheless ensure that the explanation of the withholding applies to each document or portion of the document in the category.

#### B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters*

*Committee*, 489 U.S. at 762-770. See *Sowell, Todd, Lafitte, Beard and Watson LLC*, Case No. VFA-0510 (1999); *Frank E. Isbill*, Case No. VFA-0499 (1999).

In invoking Exemption 6, WAPA determined that the release of employees' personal e-mail addresses and telephone numbers is a serious invasion of privacy. WAPA further determined that such a release would reveal personal information or records about the individuals. We agree with WAPA and find that there is a substantial privacy interest in the personal information of WAPA employees. See *L. Daniel Glass*, Case No. TFA-0150 (2006) (a DOE employee has a significant expectation of privacy regarding his personal telephone number and e-mail address).

In its Appeal, Power Wire failed to demonstrate how the disclosure of WAPA employees' personal e-mail addresses and telephone numbers will reveal anything of importance regarding the DOE or how it would serve the public interest. We have concluded that release of this type of information would not illuminate the inner workings of the federal government. *Id.* at 4. Likewise, release of this information would not further the public interest by shedding light on the operations of the federal government. *Id.* at 4.

We find that there is a significant privacy interest in maintaining the confidentiality of the withheld information. Moreover, release of this information would not shed light on the operations of government. On balance, release of the information withheld by WAPA pursuant to Exemption 6 would constitute a clearly unwarranted invasion of personal privacy. Thus, WAPA correctly applied Exemption 6 in withholding this information.

### C. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); see *Greg Long*, Case No. VFA-0060 (1995). We find that WAPA complied with the FOIA's segregability requirement by releasing to Power Wire all portions of the documents not withholdable under Exemption 6.

## III. Conclusion

Based on the foregoing information, we find that WAPA's justification for invoking the deliberative process and attorney-client privileges was inadequate with respect to its Exemption 5 withholdings. Accordingly, we remand this matter to WAPA to identify which privileges under Exemption 5 apply to the portions of the documents that are being withheld and explain the basis for all Exemption 5 withholdings in a new determination letter. We find, however, that WAPA properly withheld the personal e-mail addresses and telephone numbers of WAPA employees pursuant to Exemption 6 of the FOIA. Therefore, the Appeal will be remanded in part and denied in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by Power Wire Constructors on March 9, 2009, Case No. TFA-0297, is hereby remanded to WAPA which shall issue a new determination in accordance with the instructions set forth above.
- (2) This matter is hereby denied in all other aspects.
- (3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: March 30, 2009